BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELDA J. BROWN	)	
Claimant	)	
	)	
VS.	)	
	)	
LML PAYMENT SYSTEMS CORPORATION	)	
	)	
Respondent	)	Docket Nos. 1,019,650
	)	1,023,043
AND	)	
	)	
LIBERTY INSURANCE CORP. and CONTINENTAL WESTERN INS. CO.	)	
Insurance Carriers	)	

ORDER

STATEMENT OF THE CASE

Respondent and one of its insurance carriers, Continental Western Insurance Company (Continental), requested review of the January 29, 2007, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on June 15, 2007.[1] Gary K. Jones, of Wichita, Kansas, appeared for claimant. Edward D. Heath, of Wichita, Kansas, appeared for respondent and Continental. Elizabeth R. Dotson, of Kansas City, Kansas, appeared for respondent and its insurance carrier, Liberty Insurance Corporation (Liberty).

The Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of her employment with respondent beginning in July 2003 and continuing each and every working day through her final date of employment, May 9, 2006. For computation purposes, he concluded that claimant's date of accident was May 9, 2006. The ALJ gave equal weight to the functional impairment ratings of Dr. Pedro Murati and Dr. Paul Stein and found claimant had a functional impairment of 11.5 percent to the body as

[1]This matter was originally scheduled for oral argument on May 18, 2007, but was continued to this date at the request of counsel for respondent and Continental.

a whole. The ALJ concluded that claimant made a bona fide effort to find employment and has been unsuccessful and, therefore, has a 100 percent wage loss. In finding claimant's task loss, the ALJ adopted the opinion of Dr. J. Stanley Jones, claimant's treating physician, and concluded that claimant had a 54 percent task loss. Averaging claimant's wage loss and task loss, the ALJ computed claimant had a work disability of 77 percent. The ALJ also found that claimant had a base weekly wage of $583.76 and fringe benefits of $57.78 per week and determined her average weekly wage to be $641.50. At the oral argument before the Board, the parties stipulated to the ALJ's findings concerning claimant's average weekly wage.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent and Continental did not file a brief with the Board, but in their Application for Board Review and Docketing Statement, the issues were listed as whether claimant met with personal injury by accident arising out of and in the course of her employment on the date determined by the ALJ; the nature and extent of claimant's impairment, and whether K.S.A. 44-501(c) applies in this case. During oral argument to the Board, counsel for Continental also argued that the recent Kansas Supreme Court decision in *Casco*[2] would require separate scheduled injury awards for claimant's upper extremity injuries even if they are determined to be simultaneous and parallel.

Respondent and Liberty argue that although claimant has filed two claims for compensation, there was only one injury, a repetitive use injury to her bilateral upper extremities. Accordingly, respondent and Liberty assert the ALJ was correct in finding that claimant had one date of accident, that being May 9, 2006, claimant's last day working for respondent. Since Liberty did not have coverage for respondent on May 9, 2006, respondent and Liberty contend the ALJ correctly found respondent and Continental liable for claimant's benefits. Respondent and Liberty request that the Board affirm the Award entered by the ALJ. In the alternative, if the Board finds that there are two dates of injury, respondent and Liberty argue that Liberty owes no more than a portion of the percentage of functional impairment as assigned by Dr. Stein. Respondent and Liberty argue that the impairment ratings of Drs. Murati and Jones have no credibility. They contend that Dr. Stein is the most credible medical expert in this case, since as a court-appointed physician, he has no bias, and he is known to the court as a credible medical expert. They further argue that they have no liability for work disability or any permanency, medical bills, or lost time benefits that occurred outside Liberty's coverage period.

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[2] *Casco v. Armour-Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (2007).

Claimant requests that the Award entered by the ALJ be affirmed or that she be found permanently totally disabled. In the alternative, should claimant be found to not be entitled to a work disability and not permanently totally disabled, but instead limited to her percentages of functional impairment, then claimant requests that the record be reopened and this matter be remanded to the ALJ for additional proceedings. Claimant submits that the parties could not have foreseen the Supreme Court's holding in *Casco* and, as a result, the record is deficient in certain critical respects, including questions about when claimant reached maximum medical improvement for each condition, when each condition was rateable under the AMA *Guides*[3], and whether claimant had preexisting impairments.

The issues for the Board's review are:

(1) Did claimant meet with personal injury by accident arising out of and in the course of her employment?

(2) Did the ALJ correctly determine that for the purpose of assigning liability for permanent partial disability compensation, claimant's sole date of accident was May 9, 2006?

(3) Is claimant entitled to an award of permanent partial disability compensation based upon her percentage of impairment rating to the body as a whole (general body disability), or is she limited to an impairment rating for two scheduled injuries?

(4) If claimant is entitled to a general body disability based upon her impairment rating to the body as a whole, did the ALJ err in finding claimant had an 11.5 percent functional disability?

(5) If claimant is entitled to a general body disability, did she make a good-faith effort to find employment after her termination by respondent?

(6) If claimant is entitled to a general body disability and did not make a good-faith effort to find employment, what is her post-injury ability to earn wages?

(7) If claimant is entitled to a general body disability and made a good-faith effort to find employment, did the ALJ err in finding the task loss opinion of Dr. Jones to be the most credible?

(8) If claimant is entitled to an impairment rating to the body as a whole and made a good-faith effort to find employment, is claimant entitled to a 100 percent wage loss?

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

(9) Is K.S.A. 44-501(c) applicable in this case?[4]

FINDINGS OF FACT

Claimant worked for respondent as a judgment collector. Her job required her to use a keyboard, mouse, and telephone. She was a full time employee and was paid $11.95 per hour, plus overtime and bonuses. In 2003, claimant began having swelling in her hands and pain in both upper extremities. She reported the problem to her supervisor and was sent to Dr. Mark Melhorn for treatment in July 2003. Dr. Melhorn performed surgery on her radial nerve on her right on April 6, 2004. She returned to work the next day. Claimant initially got some short-term relief from the surgery performed by Dr. Melhorn. Later, however, she again had problems with swelling in her hands and pain in her forearms. The pain went up to her elbows and shoulders. Work activities made her hands and arms worse. Dr. Melhorn released her from treatment on June 1, 2004. He had provided no treatment for her left upper extremity, even though she had complained about symptoms on her left.

In September 2004, claimant requested a different doctor, and respondent authorized Dr. J. Stanley Jones. Claimant first saw Dr. Jones in December 2004. She complained of continued swelling in both hands and pain in her wrists, elbows and up in her arms. Dr. Jones did surgery on claimant's radial nerve on the right in July 2005, the same surgery Dr. Melhorn had performed. She was off work for about a month, after which she returned to work for respondent. Her job duties did not change, although she tried to self-accommodate to relieve her symptoms.

When claimant first went back to work after the surgery performed by Dr. Jones, her conditions initially seemed to have improved. But as she continued to work, she had problems in the elbows and in both arms which got progressively worse. On May 3, 2006, Dr. Jones placed restrictions on her. Claimant gave those restrictions to respondent. Claimant was told that it would try to find a different position for her. However, respondent found that it could not accommodate her restrictions, and claimant was terminated on May 9, 2006. Claimant has not worked since being terminated by respondent.

Claimant has been looking for work from the day after her termination up to the present. She tried to apply for at least five jobs a week. She has been looking for jobs within a 20-mile radius of her home in Derby, Kansas. She has mailed resumes and applied online but has not actually applied for a job in person or by telephone. She has had three interviews. If she is asked, she tells potential employers about her current restrictions. She would be able to physically perform the jobs she has applied for if the potential employer would make accommodations. Her current restrictions are no repetitive

[4] This issue was not raised to the ALJ at the Regular Hearing or in the submission letters.

movement, no pushing, pulling grasping, a 10 pound weight limit, no vibrating tools, and no working in a cold environment.

Dr. J. Stanley Jones, a board certified orthopedic surgeon with an added certification in hand surgery, was authorized to treat claimant's work-related injuries. He initially saw her on December 6, 2004. Claimant complained of pain and swelling in her hands and forearms. She had severe pain over the posterior interosseous nerve, especially with compression. She had symptoms in both hands and arms. Dr. Jones diagnosed her with recurrent entrapment of her posterior interosseous nerve. He treated her with an injection to the posterior interosseous nerve, which was given in the right elbow area on December 20, 2004. Claimant improved after the injection, which confirmed Dr. Jones' diagnosis. He then recommended a decompression of claimant's posterior interosseous nerve. That surgery was performed on July 12, 2005. Claimant was taken off work until August 3, 2005.

When Dr. Jones saw claimant again on August 3, 2005, he noted she was having symptoms on her left side with her posterior interosseous nerve and her triangular fiber cartilage (TFC). He let claimant return to work four hours a day. Claimant called him on August 12 complaining that she spent a significant amount of time typing and she was having numbness and nerve pain radiating to her shoulder. However, she wanted to continue working, and Dr. Jones kept her at four hours a day.

On August 31, 2005, claimant returned to see Dr. Jones post surgery. She was working eight hours a day at that time, but her typing speed was slower. She was still having numbness to her hands and her left arm was causing her significant problems. She had tenderness to palpation over her incision. Claimant was told to continue working and other activities as tolerated. Dr. Jones continued to see her in October, and in November he ordered a nerve conduction study. Claimant had a normal nerve conduction study, which meant that there was not 30 percent injury to any of the nerves. She was placed in cock-up splints.

By March 14, 2006, claimant was still having some soreness over the right posterior interosseous nerve and tenderness over the deltoid insertion. Dr. Jones diagnosed her with posterior interosseous nerve on her left with a possible TFC tear. He sent her for a Greenleaf evaluation and got her impairment rating. Greenleaf is a computer-generated impairment rating. Basically, the impairment rating is based on range of motion, sensation, pinch strength and grip strength. It is collected by the computer, and the computer generates an impairment rating. The evaluation was done by a certified physical therapist at Dr. Jones' direction. Dr. Jones has observed Greenleaf evaluations done and said a Greenleaf evaluation is more valid than an evaluation done by a physician because it takes the physician's bias out of it. The Greenleaf evaluation uses the AMA *Guides*. The loss of sensation is subjectively determined by the certified physical therapist and then entered into the computer. Range of motion is measured by a goniometer that is hooked up to the computer, and the computer calculates what the range is. The computer takes a range of

motion of every joint one time. The computer measures the range of motion, not the certified physical therapist. If Dr. Jones had done the impairment rating, he would have taken a measurement of every joint in the hand, flexion, extension, sensory, Jamars, pinch strength, and opposition. In this case, Dr. Jones did not do it because "a computer can do it better than I can."[5] Dr. Jones reviewed the report from the Greenleaf evaluation and, in his professional opinion, the report is correct. Based on his treatment of claimant and the Greenleaf report, Dr. Jones gave claimant the impairment rating as computed by the Greenleaf evaluation. Based upon a reasonable degree of medical certainty, Dr. Jones opined that claimant had a 56 percent permanent partial impairment (PPI) of the right upper extremity and a 58 PPI of the left upper extremity, which converted to a total body impairment of 57 percent with strengths. The objections to Dr. Jones' impairment opinions are overruled.

Dr. Jones gave claimant restrictions on May 3, 2006, of 10 pound weight restriction, no pushing, pulling, grasping, grabbing, repetitive motion, vibratory tools, or cold environments. With these restrictions in mind, Dr. Jones reviewed a task list prepared by Jerry Hardin. He agreed with Mr. Hardin's designations of whether claimant could or could not perform a task. Accordingly, he agreed with Mr. Hardin that claimant had a 47 percent task loss. Dr. Jones found no evidence of symptom magnification.

Dr. Pedro Murati is board certified in physical medicine and rehabilitation and in electrodiagnosis and independent medical evaluations. He examined claimant on August 16, 2004, at the request of claimant's attorney. Dr. Murati determined that claimant was involved in a work-related injury in her employment with respondent, where she had been working as a judgment collector. Her work involved typing all day, which caused pain in her hands and wrists bilaterally. Claimant had undergone a partial lateral epicondylectomy and conjoined tendon release of the radial nerve on her elbow on the right and was released on June 1, 2004. She continued to work for respondent and currently has pain when typing, which causes swelling and sharp pains in both hands.

On examination, Dr. Murati found that claimant's grip strength was normal. Reflex testing showed she was missing her pronator reflexes. The sensory exam was intact. Muscle strength testing was intact. Carpal compression was positive on the left, negative on the right. Ulnar compression testing was positive bilaterally. Finkelstein's sign was positive on the left. There was no crepitus, instability or Finkelstein's sign on the right. There was constant popping of the left wrist with negative instability. There was bilateral tenderness in the interossei between the second and third digits. Shoulder examination was negative bilaterally. Dr. Murati's diagnoses were status post right partial lateral epicondylectomy, status post conjoined tendon release of radial nerve on the right, early

[5] Jones Depo. at 31.

bilateral ulnar cubital syndrome, early left carpal tunnel syndrome, and bilateral interossei sprain.

Dr. Murati gave claimant restrictions of no heavy grasping with both hands; no lifting, carrying, pushing, or pulling greater than 20 pounds; 20 pounds occasional repetitive grasping and grabbing; 10 pounds frequent lifting, carrying, pushing, or pulling; and limiting keyboarding to 15 minutes on, 45 minutes off. He opined that claimant's diagnoses are a direct result of her work-related injury that occurred approximately July 15, 2003, and each and every work day thereafter. He said that claimant's job of constant typing would not be conducive to a good prognosis in her case.

Dr. Murati rated claimant as having a 5 percent PPI for right ulnar cubital syndrome. For right epicondylectomy, Dr. Murati rated claimant as having a 5 percent PPI. For the release of the radial nerve at the elbow, he rated her as having a 10 percent PPI. These combined for a 23 percent right upper extremity impairment, which converts to a 14 percent whole person impairment. For claimant's left carpal tunnel syndrome, he rated claimant as having a 5 percent left upper extremity impairment. For her left ulnar cubital syndrome, he rated her as having a 5 percent left upper extremity impairment. These combined for a 10 percent left upper extremity impairment, which converts to a 6 percent whole person impairment. Using the Combined Values Chart, the whole person impairments combined for a 19 percent PPI to the body as a whole.

Dr. Murati reviewed the task list prepared by Jerry Hardin. Of the 38 unduplicated tasks on the list, Dr. Murati believed that claimant was unable to perform 17 for a 45 percent task loss.

Dr. Paul Stein performed an independent medical evaluation (IME) of claimant pursuant to an order by the ALJ. Dr. Stein was asked to provide an impairment rating and to recommend restrictions. After reviewing claimant's past medical records and performing a physical examination, Dr. Stein diagnosed claimant with overuse or cumulative trauma syndrome affecting both upper extremities. Despite claimant's complaints of numbness in both hands, nerve conduction testing showed no evidence of sensory loss. Dr. Stein found no evidence of carpal tunnel syndrome. Dr. Stein also noted that results of his examination suggested some elements of symptom magnification.

Based on the AMA *Guides*, Dr. Stein found that claimant had a 3 percent impairment to each upper extremity for bilateral radial tunnel syndrome. This represented a 4 percent whole person impairment. Dr. Stein recommended that claimant perform no intensive and continuously repetitive activity with either hand or upper extremity.

Jerry Hardin, a human resources consultant, met with claimant on June 6, 2006, at the request of claimant's attorney. He prepared a list that included 38 unduplicated tasks claimant had performed in the 15-year period before her accident. Mr. Hardin found that

claimant has fewer positions available to her because of her injury and resulting permanent restrictions. She is capable of earning a post-accident wage of $300 per week. Compared to her preinjury average weekly wage of $641.50, this computes to a wage loss of 53 percent. However, Mr. Hardin acknowledged that there could be jobs available to claimant that would be in the $320 to $350 per week range. He opined that at the minimum, she could work for a fast food company and earn $5.15 per hour. Since claimant was not working at the time Mr. Hardin met with her, she had a 100 percent wage loss at that time. He did not discuss with claimant her job search.

In Docket No. 1,019,650, claimant claimed a bilateral upper extremity injury that occurred "July 15, 2003, and each and every working day thereafter" caused by repetitive typing and use of the computer.[6] In Docket No. 1,023,043, claimant filed an Application for Hearing claiming injuries to her bilateral upper extremities on "September 1, 2004, and each and every working day thereafter," caused by repetitive use of her upper extremities in typing and other repetitive activities.[7] Liberty had coverage from January 1, 2004, through December 31, 2004. Continental had insurance coverage after January 1, 2005, throughout the rest of the period of time claimant worked for respondent. Both insurance carriers deny that claimant suffered personal injury by accident during their respective dates of coverage.

PRINCIPLES OF LAW

K.S.A. 44-534(a) states in part:

> Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due.

K.A.R. 51-3-8 states in part:

> (a) Before the first hearing takes place, the parties shall exchange medical information and confer as to what issues can be stipulated to and what issues are to be in dispute in the case. The following stipulations shall be used by the parties in every case:
> QUESTIONS TO CLAIMANT
> 1. In what county is it claimed that claimant met with personal injury by accident? (If in a different county from that in which the hearing is held, then the

[6] Form K-WC E-1 Application for Hearing filed Oct. 14, 2004.

[7] Form K-WC E-1 Application for Hearing filed May 11, 2005.

> parties shall stipulate that they consent to the conduct of the hearing in the county in which it is being held.)
>
> 2. Upon what date is it claimed that claimant met with personal injury by accident?
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> QUESTIONS TO RESPONDENT
>
> 3. Does respondent admit that claimant met with personal injury by accident on the date alleged?
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> . . . .
>
> 10. What was the average weekly wage?
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> . . . .
>
> 20. Have the parties agreed upon a functional impairment rating?
>
> (b) An informal pre-trial conference shall be held in each contested case before testimony is taken in a case. At these conferences the administrative law judge shall determine from the parties what issues have not been agreed upon. If the issues cannot be resolved, the stipulations and issues shall be made a part of the record.
>
> (c) The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in the proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.

In *Treaster*,[8] the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*,[9] in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury. The long line of cases applying the rule for the last date possible as the date of accident was altered by the Legislature's July 1, 2005, amendment to K.S.A. 44-508(d), which now states that a claimant's date of accident is the earliest of several triggering events:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed

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[8] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[9] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

> to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[10]

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

In *Wardlow*[11], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

K.S.A. 44-510d(a) states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in

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[10] K.S.A. 2006 Supp. 44-508(d)

[11] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

K.S.A. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total

physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510f(a) states in part:

Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, $125,000 for an injury or any aggravation thereof;

. . .

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, $100,000 for an injury or any aggravation thereof; and

(4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.

K.S.A. 2005 Supp. 44-501(c) states:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

In Casco[12], the Kansas Supreme Court stated:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a

[12] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 8, 9, 10, 11, 154 P.3d 494, *reh. denied* (2007).

> rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the [*sic*] K.S.A. 44-510d.
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> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-501d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.
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> K.S.A. 44-510c(a)(2) requires that the disability result from a single injury and that condition may be satisfied by the application of the secondary injury rule.

In *Tull*,[13] the Kansas Court of Appeals stated:

> In perhaps the most definitive statement by our Supreme Court on the subject, it has been held that disputes between contending insurance carriers concerning their respective liabilities for the payment of compensation awarded to an injured worker employed by their insured should not be litigated in the compensation proceedings themselves, but in separate proceedings between the carriers brought for such purpose.

ANALYSIS

Claimant suffered personal injury by accident arising out of and in the course of her employment with respondent through a series of repetitive traumas. The claimant's date of accident is May 9, 2006. Claimant had surgery on April 6, 2004, but she returned to work the next day. She had surgery again on July 12, 2005, after which she was taken off work until August 3, 2005. She again returned to work for respondent and performed the same job duties until May 3, 2006, when Dr. Jones placed restrictions on her that respondent could not accommodate. Her last day worked was May 9, 2006. This becomes the date of accident under both *Treaster* and K.S.A. 2006 Supp. 44-508(d), as it is the date the authorized physician took claimant off work due to the injuries or restricted her from performing the regular duty work that caused the conditions.

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[13] *Tull v. Atchison Leather Products, Inc.*, 37 Kan. App. 2d 87, 94, 150 P.3d 316 (2007), citing *Kuhn v. Grant County*, 201 Kan. 163, Syl. ¶ 3, 439 P.2d 155 (1968).

There is no distinction to be drawn between injuries to bilateral upper extremities where the injuries are simultaneous versus those where the injury is to first one upper extremity and then to the other as a result of overcompensation. As the Kansas Supreme Court stated in *Casco*, by application of the secondary injury rule the injuries are treated the same as when the disability results from a single injury.[14] Nevertheless, *Casco* "explicitly overrule[d] *Honn* and its progeny as it relates to the parallel injury rule."[15] No combination of scheduled injuries, whether simultaneous, parallel, or otherwise, can transform a partial disability that is in the schedule of K.S.A. 44-510d to a permanent partial general disability under K.S.A. 44-510e.

There is no testimony or evidence that claimant is incapable of engaging in substantial gainful employment. To the contrary, claimant has worked post-accident and is continuing to seek employment. The work restrictions from the medical experts do not preclude claimant from employment in the open labor market. Mr. Hardin opined that claimant retains the ability to earn $300 per week within those restrictions. The presumption of permanent total disability in K.S.A. 44-510c(a)(2) is rebutted.

Dr. Jones rated claimant as having a 56 percent PPI to the right upper extremity and a 58 percent PPI to the left upper extremity. Dr. Murati rated claimant as having a 23 percent PPI to the right upper extremity and a 10 percent PPI to the left upper extremity. Dr. Stein rated claimant as having a 3 percent PPI to the right upper extremity and a 3 percent PPI to the left upper extremity. The Board finds the opinion ratings of all three doctors to be equally credible and finds that claimant has a 27.33 percent PPI to the right upper extremity and a 23.67 percent PPI to the left upper extremity at the 200-week level. The respondent and its insurance carriers shall be jointly and severally liable for the benefits awarded.[16]

CONCLUSION

Claimant's date of accident is May 9, 2006. As a result of her accidents, claimant has suffered a 27.33 percent permanent impairment of her right arm at the level of the arm and a 23.67 percent permanent impairment to her left arm at the arm level. Claimant is not entitled to an award based upon a permanent total disability as that presumption has been rebutted. Claimant is entitled to a permanent partial disability award based upon her percentages of functional impairment as two separate scheduled injuries at the 210-week level. As claimant's award is based upon the schedule in K.S.A. 44-510d, there can be no work disability. All other issues are moot.

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[14] *Casco*, 283 Kan. at Syl. ¶ 11, 18-19.

[15] *Id.* at 527.

[16] *Tull*, 37 Kan. App. 2d 87.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 29, 2007, is modified as follows:

Claimant is entitled to 5 weeks of temporary total disability compensation at the rate of $427.69 per week in the amount of $2,138.45, followed by 56.03 weeks of permanent partial disability compensation at the rate of $427.69 per week, in the amount of $23,963.47 for a 27.33 percent loss of use of the right arm, making a total award of $26,101.92, all of which is due and owing and ordered paid in one lump sum less any amounts previously paid.

Claimant is entitled to 49.71 weeks of permanent partial disability compensation at the rate of $427.69 per week, in the amount of $21,260.47 for a 23.67 percent loss of use of the left arm, making a total award of $21,260.47, all of which is due and owing and ordered paid in one lump sum less any amounts previously paid.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. K.S.A. 44-536(b) requires that the Director review fee agreements and approve the contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

IT IS SO ORDERED.

Dated this _____ day of July, 2007.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Gary K. Jones, Attorney for Claimant
Edward D. Heath, Attorney for Respondent and its Insurance Carrier, Continental
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier, Liberty
John D. Clark, Administrative Law Judge